Kho Poh Teck v Digi Telecommunications Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–72 OF 2002-III (II)
DAVID WONG J
17 APRIL 2006

Tort — Defamation — Pleadings — Injury to reputation — Whether plaintiff could sue for damages arising from injury to reputation in action for negligence

Tort — Negligence — Pleadings — Injury to reputation — Whether plaintiff could sue for damages arising from injury to reputation in action for negligence

On 10 April 2000, the defendant commenced a legal action in the magistrate's court ('the summons') against the plaintiff for the sum of RM1,041.41 owing in a mobile phone account based on an application form allegedly signed by the plaintiff. The summons was served by way of substituted service by publishing the same in the *Borneo Post* in Kuching on 1 August 2000. Upon knowledge of the action, the plaintiff concluded that he had been wrongly sued as he never used the defendant's services. He then made a police report and instructed his solicitors to write to the defendant and their solicitors. Nothing materialized until in 31 October 2000 when the defendant's solicitors offered to withdraw the summons with no order as to costs and liberty to file afresh. This was rejected by the plaintiff as he was of the view that he should not bear the costs and also that the defendant should make an apology to him for having been wrongly sued. On 12 December 2000, the summons was withdrawn in the magistrate court by the defendant with costs to the plaintiff to be taxed and liberty to file afresh. Sometime in October 2001, the plaintiff's application for a hire purchase loan was rejected by a bank on the ground that the plaintiff's name appeared in their credit check system which captured people's name when they were sued. Upon the plaintiff's request, the defendant wrote to CTOS Sdn Bhd and rectified the situation by a letter dated 16 October 2001. The plaintiff then sued the defendant, requesting for a declaration that the purported mobile phone agreement was never executed by the plaintiff and declared void, and damages.

The plaintiff claimed that there was a duty of care on the part of the defendant to ensure that the plaintiff's name did not appear in credit checking system of the financial institutions and system of data collecting companies, and that the duty was breached by the defendant resulting in damage to the plaintiff's reputation. The plaintiff claimed that his credit and reputation had been injured by the defendant's failure to inform the relevant financial institutions the withdrawal of the summons in the magistrate court. The defendant submitted that there was no such duty and also that to impose such a duty would place a heavy burden of having to inform the world at large that the plaintiff had withdrawn the legal action. The defendant further submitted that the plaintiff in any event had not proved the damages suffered.

The issue was whether the plaintiff could sue for damages arising from injury to reputation in an action for negligence.

Held, dismissing the plaintiff's claim:

(1) The plaintiff was in fact asking the court to preempt a speculative strike by the defendant who had after being informed by the plaintiff of the wrongful suit withdrew the summons in the magistrate court. The fact that the defendant had withdrawn the summons in the magistrate court implied that the plaintiff had been wrongly sued and it could be reasonably assumed by the court for all intents and purposes the defendant had given up in enforcing the purported agreement. Thus the declarations had no connection to the gist of the matter at hand. The court should not exercise its discretion to grant a declaration on a matter which was not a live issue before the court (see para 12).

(2) Injury to one's reputation or credit could only be done through defamation. In this case, the plaintiff's injury to his credit and reputation stemmed from the publication of the advertisement in the *Borneo Post* newspaper on 1 August 2000 for the purpose of substituted service of the summons against the plaintiff which was picked up by data collector bureaus employed by financial institutions. The publication of the advertisement, being a court proceeding, was a privileged publication under the Defamation Act 1957 and gave rise to a complete defence to a defamation action (see para 22).

(3) One's credit worthiness could only refer to one's reputation. Hence, the plaintiff was in fact trying to clothe his defamation action under a negligence action (see para 23). The plaintiff's attempt to sue for defamation of character under the guise of a negligence action was improper and ought not be allowed (see para 49); *Sattin v Nationwide News Pty Ltd* 1996 NSW Lexis 2530 and *Fulton v Globe and Mail 152 DLR (4th) 377;* 1997 DLR LEXIS 1548 followed.

(4) Even if there is a duty of care, the plaintiff had failed to prove that he had suffered damage. All he did was to say that his reputation had been affected and on this he called PW1 to testify that his hire purchase application was rejected because of the publication of the substituted service of the summons was picked up by their credit control system (see para 50). In the present case, the plaintiff did not produce any evidence on how his reputation had suffered or how his professional integrity or his career had been affected. There was also no evidence of any loss suffered by the plaintiff (see para 52).

(5) The plaintiff's claim was supposedly based on tort and any loss claimed must be for 'economic loss'. Here the plaintiff's counsel bent over backward to say that this was a claim for a breach of duty of care. If that was what he wanted, then he had to prove that the plaintiff had suffered economic loss and not loss of injury to feeling, loss of pride and self esteem (see para 54).

[Bahasa Malaysia summary

Pada 10 April 2000, defendan telah memulakan satu tindakan undang-undang di mahkamah majistret ('saman tersebut') terhadap plaintif untuk sejumlah

A RM1,041.41 yang terhutang dalam akaun telefon bimbit berdasarkan satu borang permohonan yang dikatakan telah ditandatangani oleh plaintif. Saman tersebut telah disampaikan melalui penyampaian gantian dengan menerbitkan yang salam dalam *Borneo Post* di Kuching pada 1 Ogos 2000. Setelah mengetahui tentang tindakan itu, plaintif telah memutuskan bahawa beliau telah disaman secara salah kerana beliau B tidak pernah menggunakan perkhidmatan defendan. Beliau kemudian telah membuat satu laporan polis dan mengarahkan peguamnya untuk menulis kepada defendan dan peguam mereka. Tiada apa-apa berlaku sehingga 31 Oktober 2000 apabila peguam defendan membuat tawaran untuk menarik balik saman tersebut tanpa apa-apa perintah terhadap kos dan bebas untuk memfailkan yang baru. Ini telah ditolak oleh plaintif kerana beliau berpendapat bahawa beliau tidak C sepatutnya menanggung kos dan juga defendan patut memohon maaf kepadanya kerana telah menyaman dengan salah. Pada 12 Disember 2000, saman tersebut telah ditarik balik di mahkamah majistret oleh defendan dengan kos terhadap plaintif untuk dikenakan cukai dan bebas untuk memfailkan yang baru. Dalam bulan Oktober 2001, permohonan plaintif untuk satu pinjaman sewa beli telah ditolak oleh D sebuah bank atas alasan bahawa nama plaintif terdapat dalam sistem semakan kredit mereka yang menunjukkan nama mereka yang telah disaman. Atas permintaan plaintif, defendan telah menulis kepada CTOS Sdn Bhd dan memperbaiki keadaan melalui surat bertarikh 16 Oktober 2001. Plaintif kemudian telah menyaman defendan, memohon satu deklarasi bahawa perjanjian telefon bimbit itu tidak pernah E disempurnakan oleh plaintif dan diisytiharkan tidak sah, dan ganti rugi.

Plaintif telah mendakwa bahawa terdapat satu kewajipan berjaga-jaga di pihak defendan untuk memastikan bahawa nama plaintif tidak terdapat dalam sistem semakan kredit institusi-institusi kewangan dan sistem pengumpulan data syarikat-syarikat, dan bahawa kewajipan itu telah dilanggar oleh defendan yang mengakibatkan reputasi plaintif terjejas. Plaintif telah mendakwa bahawa nama dan F reputasinya telah terjejas akibat kegagalan defendan untuk memaklumkan institusi-institusi kewangan yang berkaitan tentang penarikan balik saman tersebut di mahkamah majistret. Defendan telah berhujah bahawa tiada kewajipan sedemikian dan juga bahawa untuk mewajibkan tanggungjawab sedemikian akan meletakkan beban yang berat untuk memaklumkan kepada semua bahawa plaintif telah menarik G balik tindakan undang-undang itu. Defendan selanjutnya berhujah bahawa plaintif dalam apa keadaanpun tidak membuktikan kerosakan yang dialami.

Persoalannya adalah sama ada plaintif boleh menyaman untuk ganti rugi yang timbul daripada reputasi yang terjejas dalam satu tindakan kecuaian.

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Diputuskan, menolak tuntutan plaintif:

(1) Plaintif sebenarnya memohon mahkamah untuk melengahkan satu penemuan spekulatif oleh defendan yang setelah diberitahu oleh plaintif tentang guaman I salah itu menarik balik saman tersebut di mahkamah majistret. Hakikat bahawa defendan telah menarik balik saman tersebut di mahkamah majistret secara tersirat menyatakan bahawa plaintif telah disaman secara salah dan secara munasabah bolehlah diandaikan oleh mahkamah untuk semua niat dan tujuan defendan telah berhenti menguatkuasakan maksud perjanjian itu. Oleh itu deklarasi tersebut tiada kaitan dengan inti pati perkara si sini.

Mahkamah tidak perlu menggunakan budi bicaranya untuk membenarkan deklarasi atas perkara yang bukan merupakan isu di mahkamah (lihat perenggan 12).

(2) Reputasi atau nama seseorang hanya boleh terjejas jika difitnah. Dalam kes ini, nama dan reputasi plaintif yang terjejas adalah akibat penerbitan iklan dalam akhbar *Borneo Post* pada 1 Ogos 2000 bagi tujuan penyampaian gantian saman tersebut terhadap plaintif yang diambil oleh biro pengumpul data yang dilantik oleh institusi-institusi kewangan. Penerbitan iklan itu, yang merupakan satu prosiding mahkamah, merupakan penerbitan terlindung di bawah Akta Fitnah 1957 dan memberikan pembelaan menyeluruh terhadap satu tindakan fitnah (lihat perenggan 22).

(3) Nilai nama seseorang hanya boleh dirujuk kepada reputasi seseorang. Justeru itu, plaintif pada hakikatnya cuba menutup tindakan fitnahnya dengan tindakan kecuaian (lihat perenggan 23). Percubaan plaintif untuk menyaman kerana fitnah terhadap peribadi di bawah tindakan kecuaian adalah salah dan sepatutnya tidak dibenarkan (lihat perenggan 49); *Sattin v Nationwide News Pty Ltd* 1996 NSW Lexis 2530 dan *Fulton v Globe and Mail 152 DLR (4th) 377;* 1997 DLR LEXIS 1548 diikut.

(4) Jikapun terdapat kewajipan berjaga-jaga, plaintif telah gagal untuk membuktikan bahawa beliau mengalami kerosakan. Apa yang beliau katakan adalah bahawa reputasinya telah terjejas dan berdasarkan ini beliau telah memanggil PW1 untuk memberi keterangan bahawa permohonan sewa belinya telah ditolak kerana penerbitan penyampaian gantian saman tersebut yang telah dikesan oleh sistem kawalan kredit (lihat perenggan 50). Dalam kes semasa, plaintif tidak mengemukakan apa-apa keterangan bagaimana reputasinya terjejas atau bagaimana integriti profesionalnya terjejas. Tiada juga keterangan tentang apa-apa kerugian yang dialami oleh plaintif (lihat perenggan 52).

(5) Tuntutan plaintif dikatakan berdasarkan tort dan apa-apa kerugian yang dituntut hendaklah untuk 'economic loss'. Di sini peguam plaintif sebaliknya mengatakan bahawa tuntutan ini adalah kerana pelanggaran kewajipan berjaga-jaga. Jika itulah yang diingini maka beliau hendaklah membuktikan bahawa plaintif telah mengalami kerugian ekonomik dan bukan kerugian akibat perasaan, maruah dan rasa hormat diri yang telah terjejas (lihatperenggan 54).]

Notes

For cases on defamation pleadings see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 458–464.

For cases on negligence pleadings see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 929–931.

Cases referred to

Balfour v Attorney-General [1991] 1 NZLR 519 (refd)

Barnard v National Dock Labour Board [1953] 2QB 18 (refd)

Bell-Booth Group Ltd v Attorney-General [1989] 3 NZLR 148 (refd)

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 4 MLJ 497 (refd)

Fulton v Globe and Mail 152 DLR (4th) 377;; 1997 DLR LEXIS 1548 (refd)
Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd [2001] 5 MLJ 101 (refd)
Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64 (refd)
Kiaw Aik Hang Co Ltd v Tan Tien Choy [1964] MLJ 99 (refd)
Lau Khuan Siew v Guiness Anchor Marketing Sdn Bhd [2000] MLJU LEXIS 527; [2000] 339 MLJU 1 (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 at p 307 (refd)
Sattin v Nationwide News Pty Ltd 1996 NSW Lexis 2530 (folld)
Spring v Guardian Assurance plc & Ors [1994] 3 All ER 129 (refd)
Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner For Religious Affairs, Terengganu & Ors [1969] 1 MLJ 110 (refd)
Uniphone Sdn Bhd v Chin Boon Lit & Anor [1998] 6 MLJ 441 (refd)
Wade v State Of Victoria and Another [1999] 1 VR 121 (refd)
Wong Cham Mew lwn Hong Leong Finance Bhd [1998] 2 MLJ 194 (refd)

Legislation referred to

Defamation Act 1957 s 7
Rules of the High Court 1980 O 15 r 16
Specific Relief Act 1950 s 41

Alvin Yong (Tan Yap & Tang) for the plaintiff.
Winnie Chan (David Allan Sagah & Teng) for the defendant.

David Wong JC:

[1] The plaintiff's statement of claim claims the followings:

(a) A declaration that the purported agreement was never executed by the plaintiff and the plaintiff is not liable thereunder;

(b) That the purported agreement be adjudged void and cancelled;

(c) Damages;

(d) Interest on such damages at such rate and for such period as the court shall think just;

(e) Costs;

(f) Such other order and relief as the court shall think just and proper.

[2] The defendant is resisting the claim and in its defense raised the following points:

(a) Services rendered to the person who used the plaintiff's lost identity card were done in good faith;

(b) They were not aware of the perpetrated forgery;

(c) They withdrew the action against the plaintiff in the magistrate court as soon as they were informed of the forgery;

(d) They deny that the plaintiff had suffered any damage and pleads s 7 of the Defamation Act 1957.

[3] The facts of this case are these. The plaintiff is a qualified engineer who obtained his degree from the University of Glamorgan, UK in 1991 and had worked in England for about a year. He also obtained a master degree in engineering (MSc) in 1993 and then worked in Singapore for a year or so and thereafter he returned to Kuching to work for two and half years when he was involved in several high profile projects. In late 1999, he went to Kuala Lumpur to pursue his career. He is also a member of Institute Engineer Malaysia (IEM) and Institution of Structural Engineers (UK).

[4] On 10 April 2000, the defendant commenced legal action by way of a summons in the magistrate's court ('MC summons') against the plaintiff for the sum of RM1,041.41 owing in a mobile phone account based on an application form allegedly signed by the plaintiff; The MC summons was served by way of substituted service by publishing the same in the Borneo Post in Kuching on 1 August 2000. Upon being informed by his sister Koh Poh Na (PW2) of the advertisement, the plaintiff concluded that he had been wrongly sued as he never used the defendant's services. He then made a police report and instructed his solicitors to write to the defendant and their solicitors. Nothing materialized until in 31 October 2000 when the defendant's solicitors offered to withdraw the MC summons with no order as to costs and liberty to file afresh. This was rejected by the plaintiff as he was of the view that he should not bear the costs and also that the defendant should make an apology to him for having been wrongly sued. After his refusal, he was paid a visit in Petaling Jaya by the defendant's public relation officer and a legal adviser who asked him to 'back down'. On 12 December 2000, the MC summons was withdrawn in the magistrate court by the defendant with costs to the plaintiff to be taxed and liberty to file afresh.

[5] Sometime in October 2001, the plaintiff approached Mayban Finance Bhd. in Kuching for a hire purchase facility to obtain a car loan as he planned to return to work in Kuching. The loan was rejected by Mayban Finance Bhd. on the ground that the plaintiff's name appeared in their credit check system which captures people's name when they are sued. The plaintiff flew back to Kuching and saw one Mr William Kong who acted for the defendant and requested that he made things right. Mr William Kong then wrote to CTOS Sdn. Bhd. and rectified the situation by a letter dated 16 October 2001.

[6] When this court sat on 2 March 2006 for clarification of counsels' submissions, I asked the Mr Alvin Yong, plaintiff's counsel what really the plaintiff's reliefs are. To this, Mr Yong said there are two issues:

(1) Whether or not the plaintiff is entitled to a declaration as stated in prayers 1 and 2 of the statement of claim in the circumstances of this case.

(2) Whether or not in the circumstances of this case there is a duty of care on the part of the defendant to ensure that the plaintiff's name does not appear in credit checking system of the financial institutions and system of data collecting companies?

(3) If there is a duty of care, was there a breach resulting a damage to the plaintiff's reputation?

[7] I shall now deal with issue 1. The power of the court to grant a declaration is provided for in O 15 r 16 of the Rules of the High Court 1980 ('RHC') and s 41 of the Specific Relief Act 1950 which respectively provide as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.
>
> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[8] In the case of *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid Omar CJ (Malaya) set out the guidelines of the courts on declaratory relief:

> The plaintiff has by his originating summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose: (See *Mellstrom v Garner & Ors*; [1970] 2 All ER 9) The learned Attorney-General has referred to a textbook on *Declaratory Orders* (2nd Ed), by PW Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the Court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.
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> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought. (*The Russian Commercial & Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 at p 448 per Lord Dunedin).
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> At this juncture, I would refer to *Cox v Green* [1966] 1 Ch 216 where it was held 'that on its true construction, RSC, O 15 r 17 (O 15 r 16 of our RHC) was limited to an action or proceeding in which the grant of the declaration sought would not be contrary to the accepted principles on which the court exercised its jurisdiction, one of those principles being that the court would not make a declaration in a dispute which was not a justifiable dispute.'
>
> I would also refer to the case of *Lim Cho Hock v Government of the State of Perak & Ors*. [1980] 2 MLJ 149 where the court held that the court's power to make declaratory judgments is confined to matters justifiable in the courts, and the binding declarations which it could make under O 15 r 16 of the Rules of the High Court 1980 are limited to legal or equitable rights and do not extend to moral, social or political matters. (see also s 41 Specific Relief Act 1950.)
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> Strictly it is a discretionary relief and the discretion is to be exercised judicially consistent with accepted principles. In the exercise of its discretion the court shall have regard to the facts and circumstances of each particular case before it decides to grant a declaration.

The originating summons, on the face of it, is, in my view, obviously unsustainable and, on this ground alone, the court in exercise of its powers under O 18 r 19 could strike it out.

[9] Further the court's power to grant a declaration is a discretionary one without limits. In the case of *Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner For Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110 at p 112, Wan Suleiman J adopted the dicta in *Barnard v National Dock Labour Board* [1953] 2QB 18, at p 41 wherein it was stated:

I know of no limits to the power of the court to grant a declaration except such limits as it may in its discretion impose upon itself.

[10] The issue that confronts me now is whether or not I should exercise my discretion to grant the declarations as asked for by the plaintiff. The gist of this case as agreed by both counsels is what is stated in issue 2, and that is whether or not there is a duty of care by the defendant. To recap, the declarations asked for are as follow:

Declaration that the purported Agreement was never executed by the plaintiff and the plaintiff is not liable thereunder.

That the purported agreement be adjudged void and cancelled.

[11] In the present case, the defendant is not taking further legal action against the plaintiff under the purported agreement. When the court asked Mr Alvin Yong on the relevance of the sought after declaration and the issue at hand, he replied as follows:

Court (To Mr Yong):

You are asking for a declaration, is it relevant to your cause of action. If so, how?

Mr Yong:

Our cause of action is for the declaration. What we seek for in this action is for the declaration. *The damage does not flow from the declaration*.

Court:

So what is the point of your declaration?

Mr Yong:

Because up to today the Defendant does not concede that the agreement is a result of a forgery.

Court:

But they are not suing your client now.

Mr Yong:

Yes, but that is speculative because they have reserved their right.

Court:

So you are asking the court to preempt their speculative action?

Mr Yong:

No. I am asking the Court to put a closure to the matter.

(Emphasis added.)

[12] From that discourse between Mr Alvin Yong and the court, I cannot help but to conclude that the plaintiff is in fact asking the court to preempt a speculative strike by the defendant who had after being informed by the plaintiff of the wrongful suit withdrew the MC summons in the magistrate court. There is no evidence before this court that the defendant is in the process of taking legal action against the plaintiff. In fact Miss Winnie Chan, learned counsel for the defendant informed the court orally that there is no instruction by the defendant to enforce the purported agreement against the plaintiff. This confirmation is evident in a letter to the court dated 14 March 2006. The fact that the defendant had withdrew the summons in the magistrate court implies that the plaintiff had been wrongly sued and it can be reasonably assumed by the court for all intents and purposes the defendant had given up in enforcing the purported agreement. Coming back to the issue at hand, I also find that the declarations have no connection to the gist of the matter at hand. When Mr Alvin Yong said that the damage does not flow from the declaration, it fortifies my view that I should not exercise my discretion to grant a declaration on a mater which is not a live issue before the court. Or in the words of Abdul Hamid Omar CJ in *Karpal Singh v Sultan of Selangor*, it is a declaration *whose resolution would be of no practical utility.*

[13] For the foregoing reasons, I order prayers 1 and 2 of the statement of claim be dismissed.

[14] In respect of issue 2, Mr Alvin Yong submits that the court applies the usual criteria tests which are:

(1) The forseeability of damage;

(2) Proximity of relationship; and

(3) Whether in all circumstances it is fair, just and reasonable to impose a duty (as set out by Kamalanathan Ratnam JC (as he then was) in *Uniphone Sdn Bhd v Chin Boon Lit & Anor* [1998] 6 MLJ 441).

[15] In respect of criteria 1, Mr Alvin Yong relied on the following facts (as stated in his submission):

(i) Firstly, the defendant commenced an action in the magistrate's court;

(ii) The plaintiff informed the defendant that the plaintiff never used the defendant's services and the plaintiff withdrew the action but not before the plaintiff had to engage M/s Tan, Yap & Tang Advocates to dispute the defendant's action;

(iii) M/s Tan, Yap & Tang Advocates wrote to the defendant on behalf of the plaintiff by a letter dated 14 September 2000 (at p 2 of exh C, encl 80) and informed the defendant's advocates as follows:

Furthermore, it is possible that the relevant bureau commissioned by banks and financial companies would have recorded your client's (the Defendant herein) action against our client. This will prejudice any credit which our client may need to seek in the future.

your client must take all necessary acts and steps to inform the institution of bankers and finance companies that the action had been wrongly instituted against our client and to ensure that the bureau incharge of recording such action be fully informed and all records be erased.

(iv) In October 2001, the plaintiff applied for a hire purchase finance from Mayban Finance and this application was rejected for the reason that the plaintiff's name had been captured by the finance company's system as a result of the action brought by the defendant against the plaintiff in the magistrate's court.

(v) The defendant did not inform Mayban Finance Bhd or CTOS before 15 October 2001 (at p 33 NOP).

[16] From the above facts, Mr Alvin Yong submits that the forseeability test is satisfied.

[17] As for the proximity test, Mr Alvin Yong submits that the closeness stems from the action taken by the defendant against the plaintiff in the magistrate court.

[18] For the third criteria, he submits that it is naturally fair to ask the defendant who had wrongfully sued the plaintiff to ensure that no more damage is to be done to him.

[19] For the defendant, Miss Winnie Chan submits that there is no such duty and also that to impose such a duty would place a heavy burden of having to inform the world at large that the plaintiff had withdrawn the legal action. She further submits that the plaintiff in any event had not proved the damages suffered.

[20] The factual matrix in this case in my view does not allow a straight forward application of the above criteria. Though Mr Alvin Yong states that the plaintiff is not suing for defamation but for breach of a duty of care, I still need to examine whether or not that assertion is correct and this requires me to examine the pleadings which I now do.

[21] I produce herein the relevant paragraphs of the statement of claim.

13. By reasons of the matters as pleaded in paragraph 7, 8 and 9 hereinbefore and as a consequence whereof, *the plaintiff has been much injured in his credit and reputation and/or has suffered loss and damage.*

14. The said injuries and/or loss and damage were occasioned to the plaintiff by reason of the breach of duty of care and/or negligence of the defendant and/or on the part of the defendant's servant/s or agent/s.

(Emphasis added.)

PARTICULARS

(a) Approving the said purported written application, providing the said services thereunder, sued the plaintiff thereof and effecting publication of the said advertisement purportedly for substituted service without taking any or any reasonable care to see the true identity of the person who impersonated the plaintiff;

(b) Approving the said purported written application based only on the a photocopy of the identity card without checking or demanding for original identity card for comparison or at all;

(c) Failing to inform or to inform immediately the said CTOS Sdn Bhd and the said Financial Information Services Sdn Bhd in respect of the discontinuance of the action in the said summons;

(d) Failing to take reasonable care and steps or at all in the circumstances to clear the plaintiff's name from their electronic archive published by the said CTOS Sdn Bhd and the said Financial Information Services Sdn Bhd through internet for their customers which includes Mayban Finance Berhad.

(e) Further or in the alternative, failing to take any or any reasonable care or steps to prevent injury to the reputation and loss and damage to the plaintiff informing the said CTOS Sdn Bhd and the said Financial Information Services Sdn Bhd and the said banks and financial institutions as informed by the plaintiff who the plaintiff has dealings of the true status of the action in the said summons;

(f) Further or in the alternative, failing to take any or any reasonable care or steps to prevent such injury, loss and damage to the plaintiff to be further aggravated by immediately or within a reasonable time informing the said CTOS Sdn Bhd and the said Financial Information Services Sdn Bhd and the said banks and financial institutions as informed by the plaintiff who the plaintiff has dealings of the true status of the action in the said summons;

[22] By para 13 of the statement of claim, the plaintiff claims that his credit and reputation has been injured by the defendant's failure to inform the relevant financial institutions the withdrawal of the MC summons in the magistrate court. Injury to one's reputation or credit in my view can only be done through being defamed. In this case the plaintiff's injury to his credit and reputation stems from the publication of the advertisement in the *Borneo Post* newspaper on 1 August 2000 for the purpose of substituted service of the MC summons against the plaintiff which was picked up by data collector bureaus employed by financial institutions. It was rightly conceded by Mr Alvin Yong that the publication of the advertisement, being a court proceeding, is a privileged publication under the Defamation Act 1957 and gives rise to a complete defense to a defamation action. In *Wong Cham Mew lwn Hong Leong Finance Bhd* [1998] 2 MLJ 194 where Mohd Noor Ahmad J (as he then was) in respect of substituted service of originating summons said:

> Mengenai notis yang diiklankan dalam akhbar *The Malay Mail*, pihak penentang menyatakan ia dibuat mengikut perintah Mahkamah dan tidak boleh dijadikan kausa tindakan fitnah kerana ia dilindungi di bawah ss 11 dan 12 Akta tersebut.
>
> Seterusnya mahkamah berpendapat notis yang diiklankan dibuat dalam prosiding mahkamah di mana ia telah diperolehi dengan cara yang betul melalui permohonan penyampaian ganti bertarikh 20 Jun 1988 di eksh NKM-3 dan perintah dikeluarkan pada 18 Ogos 1988 di eksh NKM-4. Berikutan dari perintah tersebut, notis telah diiklankan dalam akhbar *The Malay Mail* pada 9 Disember 1988. Adalah jelas perintah tersebut

diberikan oleh penolong kanan pendaftar di dalam menjalankan tugas kehakiman beliau. Oleh itu notis tersebut adalah tertakluk di bawah perlindungan mutlak. (See also *Gatley On Libel & Slander* (7th Ed) p 401).

[23] However, he emphasises that his contention is not one of defamation but a duty of care on the part of the defendant to ensure this publication does not cause harm to the plaintiff's credit and reputation and that duty was to inform all the relevant bureau commissioned by banks and financial companies that the MC Summons against the plaintiff had been withdrawn. With respect, it is my view that one's credit worthiness can only refer to one's reputation. Hence, it is my finding that the plaintiff is in fact trying to cloth his defamation action under a negligence action. I say that simply because the plaintiff's pleading talks of injury to his reputation and credit.

[24] In his final written submission dated 24 March 2006, Mr Alvin Yong submits that he is in fact referring to 'injury to feeling' which is different to injury to reputation. Mr Alvin Yong has a problem here. He has completely departed from the plaintiff's pleadings (see para 13 of the statement of claim set out above). It is trite law that parties are bound by their pleadings and in this case the plaintiff like wise is also bound by his pleadings. (see *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99. Further in his witness statement (PW3-A), the plaintiff states that he 'was annoyed and angry'. In *Gately on Libel and Slander* (8th Ed), the learned author at p 40 said 'words which merely injure the feelings or cause annoyance but no way reflect on character or reputation or tend to be shunned or avoided are not therefore to be considered to convey a defamatory imputation.' I am aware that the plaintiff's counsel is doing his best to frame his submission to base his claim under the head of negligence but with respect he has failed to convince me that this is not an action for defamation.

[25] I come now to the next issue which is whether or not one can sue for damages arising from injury to reputation in an action for negligence? This issue was brought to counsels' attention on 17 March 2006 when this case was again fixed for clarification of counsels' submissions. Counsels then requested for an opportunity to submit on this issue which I agreed to.

[26] The English position is that damages for injury to reputation are available in an action in negligence and the defense of qualified privilege which is available in a defamation action will not be a defense in an action in negligence action. That proposition derives from the House of Lords decision in *Spring v Guardian Assurance plc & Ors* [1994] 3 All ER 129. The facts were these. The plaintiff was initially employed by second defendant but when the second defendant was taken over by the first defendant, he became employed by the first defendant. In July 1989, the plaintiff was dismissed. Upon dismissal, he looked for another job with another company but that company was obliged by the code of conduct of the insurance industry's self-regulatory body to obtain a reference from the plaintiff's previous employer, who was required by the industry rules to give a reference which make 'full and frank disclosure of all relevant matters which are believed to be true'. The defendant's reference put the plaintiff in such a bad light that his prospective

employer refused to have anything to do with him. He also failed to secure employment from other companies. He brought an action against the defendants contending that the defendants had a duty to take reasonable care in giving the reference and if they did not do that they would be liable in negligence. The defendants contended:

(i) that any duty to exercise due skill and care in preparing a reference should be negatived because, if the plaintiff were instead to bring an action for damage to his reputation, he could be met by the defence of qualified privilege which could only be defeated by proof of malice; and

(ii) that it would be against public policy to impose such a duty of care since it would inhibit frankness in the giving of references.

[27] The House of Lords by a majority of 4 to 1 held that there is a duty of care in the employer/employee relationship on the employer to exercise reasonable care in preparing references on the employee for prospective employers. And where there is a breach of that duty, the employer is liable in damages to the employee in respect of economic loss suffered by him by reason of the reference being prepared negligently. The Law Lords except for Lord Keith held that because of the forseeability of economic loss in the form of failure to obtain employment and the obvious proximate relationship between an employer and employee, it is fair, just and reasonable that the law impose a duty on the employee to take reasonable care in preparing a reference.

[28] Lord Goff's reason for his decision is based on policy consideration, as can be discerned at p 151 of the report where he said:

> In these circumstances it is, I consider, necessary to approach the question as a matter of principle. Since, for the reasons I have given, it is my opinion that in cases such as the present the duty of care arises by reason of an assumption of responsibility by the employer to the employee in respect of the relevant reference, I can see no good reason why the duty to exercise due skill and care which rests upon the employer should be negatived because, if the plaintiff were instead to bring an action for damage to his reputation, he would be met by the defence of qualified privilege which could only be defined by proof of malice. It is not to be forgotten that the Hedley Byrne duty arises where there is a relationship which is, broadly speaking, either contractual or equivalent to contract. In these circumstances, I cannot see that principles of the law of defamation are of any relevance.

[29] Lord Lowry's approach is also based on public policy which he at p 152 of the report puts as follows:

> The defendants' second argument (which, in order that it may prevail, must be made to stand independently on its own feet) is that, even if one concedes foreseeability and proximity and even if it would otherwise be just and reasonable for the plaintiff to recover under the head of negligence, public policy dictates that the person who has been the subject of a negligent misstatement shall not recover. The argument is grounded on the proposition that the maker of the misstatement, provided he has acted in good faith, must, even if he has been negligent, be free to express his views in the kind of situation (including the giving of any reference) which is contemplated by the doctrine of qualified privilege which is part of the law of defamation.

> This argument falls to be considered on the assumption that, but for the overriding effect of public policy, a plaintiff who is in the necessary proximate relation to a defendant will be entitled to succeed in negligence if he proves his case. To assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and practical arguments. This exercise could no doubt produce different answers but, for my own part, I come down decisively on the side of the plaintiff. On the one hand looms the probability, often amounting to a certainty, of damage to the individual, which in some cases will be serious and may indeed be irreparable. The entire future prosperity and happiness of someone who is the subject of a damaging reference which is given carelessly but in perfectly good faith may be irretrievably blighted. Against this prospect is set the possibility that some referees will be deterred from giving frank references or indeed any references. Placing full reliance here on the penetrating observations of my noble and learned friend, Lord Woolf, I am inclined to view this possibility as a spectre conjured up by the defendants to frighten your Lordships into submission. I also believe that the courts in general and your Lordships' House in particular ought to think very carefully before resorting to public policy considerations which will defeat a claim that ex hypothesi is perfectly good cause of action. It has been said that public policy should be invoked only in clear cases in which the potential harm to the public is incontestable, that whether the anticipated harm to the public will be likely to occur must be determined on tangible grounds instead of on mere generalities and that the burden of proof lies on those who assert that the court should not enforce a liability which prima facie exists. Even if one should put the matter in a more neutral way, I would say that public policy ought not to be invoked if the arguments are evenly balanced: in such a situation the ordinary rule of law, once established, should prevail.

[30] Lord Keith in his strong dissent held that public policy negatives such a duty. This can be seen in the following passage of his judgment (pp 135–136 of the report):

> My Lords, if no reasons of policy intervened there might be much to be said for the view that Mr Spring is entitled to succeed in his claim based on negligence, on the basis that it was reasonably foreseeable that damage to him would result if the reference were prepared without reasonable care and it thus incorrectly disparaged him, that there was proximity between him and those who prepared the reference, and that it would be fair, just and reasonable to impose a duty of care on the latter. This would, however, extend the ambit of liability in negligence for pure economic loss. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575; [1964] AC 465 such liability was held to exist in circumstances where a plaintiff has relied to his detriment upon a negligent mis-statement by a defendant. In the present case there is no question of reliance by the plaintiff on the carelessly prepared reference. But in any event this is, in my opinion, a case in which the second stage of the test propounded by Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at p 498; [1978] AC 728 at 752 properly comes into play. He there said:
>
> Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise …
>
> In *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at p 712; [1988] AC 175 at p 193I said:
>
> > The second stage of Lord Wilberforce's test is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability.

A …

… The policy grounds which underlie the defence of qualified privilege in an action for defamation were thus stated by Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at pp 668–669; [1975] AC 135 at p 149:

B My Lords, as a general rule, English law gives effect to the ninth Commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction: if he cannot prove that defamatory matter which he published was true, he is liable in damages to whomsoever he has defamed, except where the publication is oral only, causes no damage and falls outside the categories of slander actionable per se. The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing C public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which D gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit — the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

E

In my opinion, the same grounds of public policy are applicable where the claim is based not on defamation as such but on negligence associated with the making or publication of an untrue statement, where the occasion on which that was done was a privileged one in the sense in which that expression is used in the context of defamation law. If liability in negligence were to follow from a reference prepared F without reasonable care, the same adverse consequences would flow as those sought to be guarded against by the defence of qualified privilege. Those asked to give a reference would be inhibited from speaking frankly lest it should be found that they were liable in damages through not taking sufficient care in its preparation. They might well prefer, if under no legal duty to give a reference, to refrain from G doing so at all. Any reference given might be bland and unhelpful and information which it would be in the interest of those seeking the reference to receive might be withheld.

[31] One can see from the approaches of the Law Lords when determining whether H or not to create a new class of tort that it boils down what they perceive is the present public policy.

[32] In the New Zealand jurisdiction, the law is as set out in the case of *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 and *Balfour v Attorney-General* [1991] 1 NZLR 519. I

[33] In *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, the plaintiff sued the defendant both for defamation and negligence. In the trial court, the judge found that there was no defamation but awarded damages under the head of negligence. The breach relates to disclosing the results of certain trials of the product

to Bell-Booth before publishing them, and to give Bell-Booth a proper opportunity to satisfy itself as to those results and be consulted as to their presentation. The defendant appealed and the same was allowed.

[34] The learned judge (Cooke (P)) sets out the reasons:

> Negligence in words can certainly give rise to liability if there is a duty of care. One need only mention Hedley Byrne. Breach of confidence is actionable, subject to special defences, however the duty of confidence arises (*Attorney-General v Wellington Newspapers Ltd* [1988] 1 NZLR 129 , 172). A contract may impose restraints on freedom of speech, subject no doubt to public policy defences. In some cases damages for breach of contract can extend to loss of publicity or positive harm to reputation: see generally *McGregor on Damages* (15th Ed, 1988) para 54. But cases in the foregoing categories are all readily distinguishable. As far at least as the law of torts is concerned, the common understanding is almost certainly as expressed by Hallett J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 , p 399: 'a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action …'
>
> … It was argued for the appellant, inter alia, that neither defamation nor slander of goods requires a background duty or breach; and if injury does or may involve those separate elements, there is no ground for depriving the plaintiff of a separate cause of action. That is really no more than a semantic point. The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment. The duty in injurious falsehood may be defined as a duty not to disparage goods untruthfully and maliciously. In substance the appellant would add to these duties a duty in such a case as this to take care not to injure the plaintiff's reputation by true statements. All the arguments for the appellant, though put skillfully in various ways by counsel, reduce to that proposition. In our opinion, to accept it would be to introduce negligence law into a field for which it was not designed and is not appropriate.

[35] In *Balfour v Attorney-General*, the plaintiff who was a primary school sued the government based on a memorandum stating that he was a long-practicing and blatant homosexual. He claimed in negligence on the basis that the memorandum had been placed on the file without fair and reasonable investigation, the allegation of homosexuality had been acted upon, and the memorandum had become accessible to prospective employers.

[36] The New Zealand Court of Appeal said:

> Negligence
>
> … The reliance giving rise to the special relationship of proximity here, Mr Camp argued, arose from the statute: the Department being the principal repository of personal information about teachers, a teacher is necessarily dependent upon it for references, recommendations and advice to prospective employers, whether in the State or the private sector. That being so, the submission went, the Department is under a duty to exercise care as to the accuracy of the information it records, because the teacher has little if any control over it, yet it is likely to affect his of her future career, perhaps profoundly.
>
> Mr Camp was at pains to distinguish this claim from one in defamation. In contrast with the case he appears to have put to Greig J, and his reliance then on *Lawton v BOC Transhield Ltd* [1987] 2 All ER 608, in this Court he emphasised that this is not a claim for injury to reputation, nor is it one for the publication of a defamatory statement; rather, it is founded

A on a judgment passed by Mr Woodward and the recording of that judgment in the Departmental file, the judgment resulting in Mr Balfour's rejection for the training course, the recording in confirmation to whoever came to know of it of a belief already held in the local area.

B This second aspect comes perilously close to defamation. Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned, but not necessarily appropriate to each other: see *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 , 155–157. An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame. In *Lawton v BOC Transhield Ltd* Tudor Evans

C J held that an employer owed his former employee a duty of care in giving a reference to a prospective new employer, but his decision, which has been considerably criticised, was disapproved by this Court in Bell-Booth.

Leaving aside then any consideration touching upon the publication of defamatory material how is the duty of care asserted in this case to be formulated? It must be one to avoid forming and acting upon a belief as to the character of a teacher without taking reasonable

D steps to verify the belief. We think that fairly puts the appellant's case without trespassing into the area of defamation. If one assumes, as Greig J did, that the necessary proximity exists, the question becomes whether in the particular circumstances such duty of care ought to be recognised. The question can we think be framed thus whether one accepts the incremental approach expounded by Brennan J in *Sutherland Shire Council v Heyman* [1985] 60 ALR 1 , p 43 adopted in both Caparo, and Murphy, or one applies the second,

E policy, step propounded by Lord Wilberforce in Anns [1978] AC 728 , p 752. We see no acceptable basis for recognising such a duty.

[37] The Australian position appears to be unsettled. In the state of New South

F Wales Levine J in the Supreme Court (equivalent to local High Court) in *Sattin v Nationwide News Pty Ltd* [1996] NSW Lexis 2530 refused to follow the House of Lords in *Spring*'s case and preferred the reasoning of the New Zealand cases. In *Sattin*'s case it involved the publication of certain photos of the plaintiff and another person with a caption stating 'LEFT: Newly weds David Leslie and Janette Sattin enjoyed a celebratory drink at the Beach Bistro'. The plaintiff sued for

G defamation on the ground that the caption was factually wrong hence imputes that she is a bigamist among other things. In an application to amend the statement of claim, the plaintiff wanted to include a claim in negligence stemming from the defendant's failure to check the marital status of the plaintiff. Levine J dismissed the application to amend and in doing so justified his decision as such:

H Publications in instruments of mass communication involve competing questions of freedom of speech and protection of reputation and as the learned President put it in Bell-Booth the law deals with those competing questions by means of 'compromises'. The resolution of that tension-between the two competing interests is represented by the law of defamation at common law and by its statutory modifications.

I I myself find it difficult to disagree with the learned President when he says that 'the law as to injury to reputation and freedom of speech is a field of its own' and the introduction into the law of defamation especially involving instruments of mass communication of some common law duty of care in effect to 'get a publication right' would amount to an unacceptable distortion of the principles of common law (as affected by statute) in the law of defamation relating to the balancing of freedom of speech and protection of reputation.

[38] In the state of Victoria, the Supreme Court (equivalent to the local High Court) in *Wade v State Of Victoria and Another* [1999] 1 VR 121, took a contrary view of Levine J in *Sattin*'s case and adopted the rationale of *Spring*'s case. The facts as stated in the Headnotes of the report are:

> The plaintiff, a former member of the Victoria Police, was employed by a company which manufactured and supplied gaming machines. The company had expressed interest in supplying gaming machines in Queensland. The Queensland Criminal Justice Commission was preparing a report for the Queensland Government on the risk of criminal involvement in the gaming machine industry in Queensland. In response to a request from the commission, the Victoria Police provided information to the commission about the plaintiff's police service. The plaintiff alleged the information was false or misleading and caused him to lose his job. He sued the State of Victoria and the member of the Victoria Police who had provided the information alleging negligence and defamation.

[39] Pursuant to r 47.04 of the Supreme Court Rules a trial was held of three preliminary questions:

(i) Did the facts alleged in the statement of claim, if proven, give rise to a duty of care?

(ii) If the facts alleged in the statement of claim gave rise to the duty of care alleged, could the breach of that duty found an action in negligence?

(iii) If the conduct alleged in the statement of claim gave rise to an arguable action in defamation, was a cause of action in negligence maintainable in respect of the same conduct?

[40] Held, answering 'yes' to each of the questions, that the employer owed the plaintiff a duty of care in respect of foreseeable loss to the plaintiff caused by the employer's provision of false information to the Criminal Justice Commission. The employer and plaintiff were in a relevant relationship of circumstantial proximity. The absence of reliance by the plaintiff on the alleged negligent conduct by the employer did not deny the existence of the duty of care. The recognition of the duty did not impose an unfair, unjust or unreasonable duty on the employer. Nor did the law of defamation cover the field so as to exclude a claim in negligence.

[41] Harper J justified the decision at p 143 as thus:

> The law of negligence, if properly applied, would however avoid the injustices and anomalies which the law of defamation would bring with it. At the same time, the law of negligence is capable of protecting adequately those who take due care to ensure that the information given is accurate and that the person to whom the information is directed is told what he or she needs to know. In other words, the person providing the information need not necessarily guarantee its correctness nor, of course, warrant the accuracy of opinions expressed. If opinions are reached after due consideration of all the information reasonably available, and if they are (where necessary) appropriately qualified, then no liability in negligence would arise.

[42] In the local jurisdiction, we have the case of *Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101. The facts were these.

The plaintiff sued for damages against the defendant bank for loss of reputation and business due to the advertisement by the official assignee in a local newspaper declaring the plaintiff a bankrupt where in fact the debt owing to the defendant had been fully settled. As such, the plaintiff contended that the defendant had a duty to take steps to annul the receiving and adjudicating orders made against him. The trial judge found the defendant negligent and ordered damages to be assessed by the senior assistant registrar who held that the plaintiff failed to prove damages. The plaintiff appealed against the decision of the senior assistant registrar. The learned judge though not required to determine whether or not there is in existence of a duty of care as the appeal related to the proof of damage nevertheless discussed the question as he puts it of whether or not 'the plaintiff can claim for loss of reputation in negligence or ought the claim for loss of reputation be founded on the tort of libel.'

[43] In determining that issue, the learned judge discussed the aforesaid New Zealand and *Spring*'s cases and came to the following conclusion:

> With all these cases before me it would seem that if the plaintiff intends to claim damages for injury to reputation or to feelings he ought to proceed to file a suit for defamation. But then the plaintiff cannot properly sue the defendant in defamation for reasons I had already stated earlier. Is the plaintiff then devoid of a remedy? Surely the plaintiff must have a remedy. Ubi jus ibi remedium; where there is a right there is a remedy. The plaintiff's cause of action in this case can only be in negligence and the trial judge has indeed found the defendant liable in negligence. However the burden still remains with the plaintiff to prove his loss.

[44] The learned judge on the one hand seems to say that an injury to reputation can only be sued by way of a defamation action. In fact, the learned judge in *Uniphone Sdn Bhd v Chin Boon Lit & Anor* [1998] 6 MLJ 441 said (at p 446):

> It is my judgement that the tort of negligence ought not to restrict the freedom of speech, and restrain publishing statements which are true. It ought not be the law that a person cannot make a statement which is true if it is foreseeable that the making of that statement could cause loss to a third party who admits to the truth of that statement.

[45] However in the very next sentence in the above quotation, he held that the plaintiff could seek his remedy by way of a negligence action because a wrong had been done and hence there must be a remedy. This I suppose could be explained by the fact that the learned judge was hearing an appeal on the issue of damage only and not on liability which the lower court had held that the defendant was liable for negligence.

[46] Hence in essence there are two schools of thoughts. One school prescribes that any claim for injury to reputation must lie within the realm of defamation law and any attempt to merge defamation and negligence will not be allowed. The other school permits a claim for both defamation and negligence in an action against injury to one's reputation. And defenses available in a defamation action, like qualified privilege will not be available in the negligence action.

[47] In deciding which school of thoughts to adopt, I rely like all the judges in the above cases on policy considerations. I am attracted to the views expressed by Levine J in *Sattin v Nationwide News Pty Ltd (above)* who after analyzing *Spring*'s case and the New Zealandcases at pp 16 and 29 respectively said:

> It appears to me that there is a good reason namely the public policy considerations referred to by Lord Diplock and they are at odds with any enforceable duty to exercise due care and skill in the provision of a reference. It appears that Goff LJ is suggesting that the defense of qualified privilege is relevant to one cause of action but not to another and that, in effect, is the end of the matter. For the defendant it is suggested, and I agree, that public policy should logically transcend mere forms of action, it not being merely a matter of a defense being applicable to one cause of action but not to another: the view of Lord Goff fundamentally frustrates the policy behind the defense of qualified privilege and clearly so …
>
> I would add conformably with what their Honours in New Zealand's Court of Appeal and his Lordship Lord Keith have remarked upon, that the law of negligence really has a limited role to play in the matter of communications, it fundamentally being confined to the Hedley Byrne situation or perhaps others in which freedom of speech is not a legitimate consideration. In media situations the lawfulness or otherwise of communication to the public depends on the operation of the laws and rules of defamation: this is not to say that a communication cannot amount to a breach of confidence for example or indeed a breach of contract but damages for publication in circumstances of the case with which I am concerned in my view have always been governed by the law of defamation which is the field in which the remedies have been sown and harvested. As Brennan J cautioned in *Sutherland Shire Council v Heyman* [1985] 157 CLR 424 at 481: 'it is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by massive extension of a prima facie duty of care …

[48] I also fully concur with the sentiments by Belzil J in the Canadian case of *Fulton v Globe and Mail* 152 DLR (4th) 377;; 1997 DLR LEXIS 1548 (Alberta Court of Queen's Bench) which are:

> There are sound policy reasons for upholding the integrity of the law of defamation which, as noted above, does reflect a balancing of the interests of maintaining free speech while protecting the rights of individuals.
>
> The law of negligence is not concerned with any such balancing of interests but rather is concerned with breaches of duties of care.
>
> Furthermore, the court should resist expanding loss of reputation claims in the context of publication beyond the law of defamation in that to permit claims in negligence would allow plaintiffs to circumvent defences available to defendants in defamation claims.
>
> In my view, paragraph 23 of the statement of claim cannot stand as clearly this is an attempt to advance an independent cause of action in negligence for loss of reputation which is properly the subject of a claim in defamation.

[49] Accordingly, I hold that the plaintiff's attempt to sue for defamation of character under the guise of a negligence action is improper and ought not be allowed.

[50] In any event, even if there is a duty of care, the plaintiff had failed to prove that he had suffered damage. All he did was to say that his reputation had been

affected and on this he called PW1 to testify that his hire purchase application was rejected because of the publication of the substituted service of the MC summons was picked up by their credit control system. I agree with Miss Winnie Chan who said that PW1 in circumstances as this case would rely on the publication as one of the factors in his decision to either approve or not approve the loan. I am sure that if PW1 had known that the true circumstances behind the MC summons, he would have approved the loan.

[51] I also take this opportunity to quote the judgment of Edgar Joseph J (as he then was) in the case *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 307:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* 172 ER 50; [1825] 2 C&P 109 and *Twyman v Knowles* 138 ER 1183.
>
> On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at p 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'.
>
> Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one-man-business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given. (See para 345 *McGregor on Damages* (15th Edition)).
>
> His Lordship also went on to say thus, at p 369:
>
> In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17, namely, that: Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[52] In the present case, the plaintiff did not produce any evidence on how his reputation had suffered or how his profession integrity or his career had been affected. There was also no evidence of any loss suffered by the plaintiff. I agree with what Rahmah Hussein J (as she then was) said in *Lau Khuan Siew v Guiness Anchor Marketing Sdn Bhd* [2000] MLJU LEXIS 527; [2000] 339 MLJU 1:

> It is also my considered opinion that a reasonable man would not have concluded that a notice of substituted service, indicates that the plaintiff is a dishonest businessman as it is obvious that such notice merely indicates that a suit has been filed against a certain person and it cannot be served on him personally.

[53] The facts here are the same which concerns a substituted service of a wrongful action against the plaintiff.

[54] Furthermore, the plaintiff's claim is supposedly based on tort and any loss claimed must be for 'economic loss'. Here the plaintiff's counsel bends over backward to say that this is a claim for a breach of duty of care. If that is what he wants then he has to prove that the plaintiff had suffered economic loss and not loss of for injury to feeling, loss of pride and self esteem. On this point, I refer your Lordship to the judgment of Kamalanathan J in *Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd* where he stated:

> The House of Lords held that there was a duty of care not to make a negligent misstatement which would cause economic loss (emphasis provided) to the plaintiff. The ratio can be distilled from the words of Lord Woolf at p 176 of the judgment. He says:
>
> … In an action for negligence, on the other hand, the subject of the reference will be primarily interested in and largely limited to his economic loss. It would seem based on the decision of the House of Lords in Spring, that the plaintiff in the case before me cannot claim for mere loss of reputation in negligence and cannot claim damages in negligence without proving the economic loss he has sustained. It is also necessary to bear in mind the words of the English Court of Appeal in *Joyce v Sengupta & Anor* [1993] 1 WLR 337 at p 348 wherein it held the view that 'the remedy for such loss (all non pecuniary) is an action for defamation in which, incidentally, damages for injury to feelings may be included in a general award of damages …'

[55] The cases which Mr Alvin Yong relies for his claim for loss of self esteem are distinguishable from the present case. In *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 4 MLJ 497, the plaintiff in that case was assaulted and the injury to feelings stems from the wrongful physical act of the first defendant. Similarly in the case of *Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors*, the plaintiff was ragged and assaulted in an orientation program by the first and second defendants and the court awarded damages for injuries to feelings stemming from the assault. The court held that the plaintiff's self esteem and respect must be protected. The facts of the aforesaid cases are completely different to the present case. There is no physical assault here and by this one difference, I find that the aforesaid cases are not applicable here.

[56] For the above reasons, the plaintiff's claims are hereby dismissed.

[57] As for costs, it usually goes to the successful party but the court has the discretion not to award costs to the successful party or award costs to the unsuccessful a party if the circumstances warrant it (see pp 664–665 of *Malaysian Court Practice High Court — Practitioner Edition*). In this case, I find the attitudes of the defendant unacceptable. Firstly, there was an offer to settle this matter by the plaintiff by a letter dated 1 December 2000 (pp 3 and 4 of exh C), the terms of which in my view were

reasonable. Not only did the defendant not consider the aforesaid offer, they sent their public relation personnel and legal adviser to request the plaintiff to 'back down'. Secondly, this is a simple matter which could have been settled amicably if the defendant had taken a more comprising and compassionate attitude. Instead the plaintiff sought relief in court, spent his money and time and had a court case pending for some four years. And all these because of a mistake which the defendant refuses to correct quickly. Thirdly also because of their conducts, there was also a change of solicitors which nearly caused this court to adjourn the trial. In the circumstances, I order each party to bear its own costs.

Plaintiff's claim dismissed.

Reported by Loo Lai Mee